82 - 1890

No.

Office - Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARY ANN RONCKER, On Behalf of NEILL RONCKER,
Individually and on Behalf of All Others
Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RICHARD A. CASTELLINI
City Solicitor
PHILIP S. OLINGER, *Counsel of Record*
Deputy City Solicitor
HUGH O. FROST, II
Assistant City Solicitor
Room 214, City Hall
Cincinnati, Ohio 45202-1985
Telephone: (513) 352-3328
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether the scope of judicial review, within the meaning of the Education For All Handicapped Children Act of 1975 can be expanded beyond the examination of procedural safeguards established pursuant to 20 U.S.C. Section 1412(5)(B), to require a reviewing court to determine whether a child has been provided with all feasible educational services in deciding whether the State's placement of that child is appropriate.

LIST OF PARTIES

PETITIONERS:

Cincinnati City School District Board of Education

James N. Jacobs,

In his official capacity as Superintendent of the Cincinnati City School District,

Robert Braddock

Herbert Brown

Virginia Griffin

Ann Patty

John Rue

David Schiering

Mary Schloss,

In their official capacities as the members of the Cincinnati City School District Board of Education.

RESPONDENTS:

Mary Ann Roncker,

On behalf of Neill Roncker, Individually and on behalf of all others similarly situated.

OTHER PARTIES:[1]

Franklin B. Walter,

In his official capacity as Superintendent of Public Instruction of the State of Ohio,

---

1. These parties were dismissed from the case by the respondent prior to trial in the United States District Court. Dismissal Entry appears in the Appendix.

and

Martha W. Wise
Roy D. McKinley
Martha B. Agler
Wallace E. Blake
Reverend Thaddeus Garrett, Jr.
Richard C. Glowacki
Robert W. Grosser
Virginia E. Jacobs
William M. Judd
Everett L. Jung, M.D.
Thomas A. Kelty
Gerald D. Kisner
Benjamin B. Lavin
Robert A. Lyons, Sr.
John R. Meckstroth
Ward M. Miller
Nancy L. Oliver
Donald S. Ritter
Anthony J. Russo
Ruth S. Schildhouse
Wayne E. Shaffer
Robert W. Walker
Robert E. Williams,

In their official capacities as the members of the Ohio State Board of Education.

TABLE OF CONTENTS

Question Presented I
List of Parties II
Opinions Below 2
Jurisdiction 2
Statutory Provisions Involved 3
Statement of the Case 3
Reason for Granting the Writ 6

1. The decision below conflicts with the decision of the Supreme Court as to the proper interpretation of the Education For All Handicapped Children Act of 1975 6

Conclusion 7

Appendix:

Opinion of the Court of Appeals for the Sixth Circuit (February 23, 1983) A1
Findings of Fact, Opinion and Conclusions of Law of the United States District Court (July 20, 1981) A18
Judgment of the United States District Court (July 20, 1981) A28
Dismissal Entry of the United States District Court (May 6, 1981) A29
Settlement Agreement A29
Order of the United States District Court Determining Scope of Judicial Review and Denying Class Certification (March 13, 1981) A47
Order of the United States District Court Conditionally Certifying Class Action (December 19, 1980) A49

Judgment Entry of the United States Court of Appeals for the Sixth Circuit (February 23, 1983) A54
20 U.S.C. § 1401 ..... A55
20 U.S.C. § 1412 ..... A61
20 U.S.C. § 1415 ..... A65

TABLE OF AUTHORITIES

Cases

Bd. of Ed. of the Hendrick Hudson Central School District v. Rowley, ... U.S. ....., 102 S. Ct. 3034 (1982) 6

Statutes

The Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401, et seq.:

§ 1401 3
§ 1401(19) 3
§ 1412 3
§ 1412(5)(B) 6, 7
§ 1415 3
§ 1415(b)(2) 4
§ 1415(c) 4
§ 1415(e)(2) 4, 6

No.

In the Supreme Court of the United States

October Term, 1982

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARY ANN RONCKER, On Behalf of NEILL RONCKER,
Individually and on Behalf of All Others
Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioner, Cincinnati City School District Board of Education, *et al.*, respectfully prays that a Writ of Certiorari issue to review the Opinion and Order of the United States Sixth Circuit Court of Appeals entered February 23, 1983, vacating the judgment of the District Court and remanding the case for further proceedings consistent with the Opinion.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Sixth Circuit.

Judgment Entry of United States Court of Appeals for the Sixth Circuit.

Findings of Fact, Opinion and Conclusions of Law of United States District Court, Southern District of Ohio, Western Division.

Judgment Entry of United States District Court, Southern District of Ohio, Western Division.

Dismissal Entry of State Defendants, United States District Court, Southern District of Ohio, Western Division.

Order Determining Scope of Judicial Review and Denying Class Certification of United States District Court, Southern District of Ohio, Western Division.

Order Conditionally Certifying Class Action of United States District Court, Southern District of Ohio, Western Division.

These Opinions, Orders and Entries appear in the Appendix.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment vacating the judgment of the District Court for the Southern District of Ohio, Western Division, and remanding it for further proceedings. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Education For All Handicapped Children Act of 1975, 20 U.S.C. Section 1401, et seq.:

20 U.S.C. Section 1401

20 U.S.C. Section 1412

20 U.S.C. Section 1415

The text of these statutes can be found in the Appendix beginning at page A55.

STATEMENT OF THE CASE

The respondent is the mother of Neill Roncker, who was born on April 13, 1973. Neill is a trainable mentally retarded child with a condition of either "moderate" or "severe" mental retardation.

Neill initially was enrolled in the severe/multi-handicapped class at the Pleasant Ridge Elementary School operated by the Cincinnati Board of Education. The Pleasant Ridge Elementary School is primarily a school for non-handicapped children.

In the spring of 1979, a conference was held to evaluate Neill's Individual Education Plan (IEP) as required by the Education For All Handicapped Children Act of 1975, 20 U.S.C. Section 1401(19). After the evaluation of Neill was completed, his IEP was formulated and he was assigned to a class in a county school operated by the Hamilton County Board of Mental Retardation. The school to which Neill was assigned is exclusively for mentally retarded children and he would have no contact with non-handicapped children during the school day.

Following the completion of Neill's IEP, his parents sought a due process hearing before an impartial hearing officer pursuant to 20 U.S.C. Section 1415(b)(2). The impartial hearing officer directed that Neill be placed in an appropriate special class in a regular elementary school setting.

The Cincinnati Board of Education appealed the decision of the impartial hearing officer to the Ohio State Board of Education pursuant to 20 U.S.C. 1415(c). The appeal was heard by a referee and was adopted by the Ohio State Board of Education. The Ohio State Board of Education directed that Neill be placed in the class for the severely mentally retarded at the county school operated by the Hamilton County Board of Mental Retardation and that some provision be made for Neill to receive some contact with non-handicapped children during the school day.

The respondent filed an action in the United States District Court pursuant to 20 U.S.C. 1415(e)(2), appealing the decision of the Ohio State Board of Education and seeking declaratory and injunctive relief barring the defendants from placing Neill in classes in a school where enrollment and attendance are limited to handicapped children. The State Board of Education and its individual members were dropped from the case by the respondent prior to trial.

The District Court, prior to trial, denied respondent's motion to certify the case as a class action.

This case was tried before United States District Court Judge Carl B. Rubin. Both parties presented expert testimony about Neill and his educational needs. Both parties agreed that Neill required special instruction and that he could not be placed in educational classes with non-handi-

capped children. The parties disagreed as to whether such placement should be in a school where he would have contact with non-handicapped children.

The District Court after trial of the case found that the preponderance of evidence establishes that Neill cannot be appropriately educated in a regular educational environment with the use of supplementary aids and services. The District Court further found that Neill could not be appropriately educated by continuing him in a special class placed in a school of non-handicapped children. The District Court dismissed respondent's Complaint on July 20, 1981.

The respondent filed a Notice of Appeal on August 14, 1981. The United States Sixth Circuit Court of Appeals on February 23, 1983, vacated and remanded the Decision of the District Court for further proceedings consistent with its Opinion.

The United States Sixth Circuit Court of Appeals held that: (1) the District Court utilized the wrong standard of review in deciding the case; and (2) that the District Court should have conducted a hearing before decertifying the case as a class action.

The United States Sixth Circuit Court of Appeals directed the District Court to determine on remand whether those services which made Neill's placement in the class at the Hamilton County Board of Mental Retardation School appropriate for his education could feasibly be provided in a special class which is located in a regular public school. It is from this Order and the Decision of the United States Sixth Circuit Court of Appeals vacating and remanding the Decision of the District Court for further proceedings that this Petition for a Writ of Certiorari is sought.

REASON FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of the Supreme Court As to the Proper Interpretation of the Education For All Handicapped Children Act of 1975.

In *Bd. of Ed. of the Hendrick Hudson Central School District v. Rowley*, ... U.S. ....., 102 S. Ct. 3034 (1982), the Supreme Court set forth the parameters of judicial review for suits brought under Section 1415(e)(2) of the Education For All Handicapped Children Act of 1975.

This review is not limited strictly to whether a state has met with the Act's procedural requirements. 102 S. Ct. at 3050. However, Congress did not intend that courts overturn the state's choice of appropriate educational theory, 102 S. Ct. at 3051, or, to resolve questions of educational policy or methodology. 102 S. Ct. at 3052. Rather, a court is to determine whether a state has complied with the procedures set forth in the Act, and, to determine whether the individualized educational program developed through these procedures is reasonably calculated to enable the child to receive educational benefits. 102 S. Ct. at 3051. Under *Rowley* then, a reviewing court is to determine whether a state has established procedural safeguards pursuant to Section 1412(5)(B), which assure that "to the maximum extent appropriate," handicapped children are educated with non-handicapped children.

The Court of Appeals expands the holding of *Rowley* by requiring a court to go beyond the question of procedural safeguards and whether a child's placement is appropriate and determine whether the state has provided all "feasible" services in a child's individualized educational program. This type of inquiry reaches beyond the limita-

tion of Section 1412(5)(B), expands judicial review beyond the standard outlined in *Rowley*, and involves the courts in the questions of educational policy which Congress intended to leave to the states.

CONCLUSION

The Decision of the Court of Appeals conflicts with the Decision of the Supreme Court in *Bd. of Ed. v. Rowley*. For this reason, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

RICHARD A. CASTELLINI
City Solicitor
PHILIP S. OLINGER, *Counsel of Record*
Deputy City Solicitor
HUGH O. FROST, II
Assistant City Solicitor
Room 214, City Hall
Cincinnati, Ohio 45202-1985
Telephone: (513) 352-3328
Counsel for Petitioners

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed February 23, 1983)

No. 81-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY ANN RONCKER on Behalf of NEILL RONCKER, Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v.

FRANKLIN B. WALTER, *et al.*,
Defendants-Appellees.

ON APPEAL From the United States District Court For the Southern District of Ohio.

Before: KENNEDY and CONTIE, *Circuit Judges;* and GORDON, *Senior District Judge.**

CONTIE, *Circuit Judge,* delivered the opinion of the Court in which GORDON, *Senior District Judge,* joined. KENNEDY, *Circuit Judge,* (pp. 11-17) filed a separate dissenting opinion.

CONTIE, *Circuit Judge.* In this appeal, the plaintiff challenges the placement of her retarded son under the

---

*The Honorable James F. Gordon, Senior Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.* (the Act).[1] As a condition for receiving federal aid, the Act provides that a free appropriate education must be provided to all children. 20 U.S.C. § 1412. It further requires states to establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).[2]

The Supreme Court recently decided what "free appropriate education" means in the context of the Act. *Bd. of Ed. of the Hendrick Hudson Central School District v. Rowley,* ..... U.S. ....., 102 S.Ct. 3034 (1982). In this case, we examine the Act's requirement that handicapped children be educated with non-handicapped children to the "maximum extent appropriate."

I

The plaintiff's son, Neill Roncker, is nine years old and is severely mentally retarded. He is classified as Trainable Mentally Retarded (TMR), a category of chil-

---

1. For extensive discussions as to the legislative history and background of the Act, *see Bd. of Education of the Hendrick Hudson Central School District v. Rowley,* ..... U.S. ....., 102 S.Ct. 3034 (1982); *Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103 (1979).

2. The concept that handicapped children should be educated along with non-handicapped children is popularly known as "mainstreaming."

dren with an IQ of below 50. Less severely retarded students are classified as Educable Mentally Retarded (EMR) and are generally educated in special classes within the regular public schools.

There is no dispute that Neill is severely retarded and has a mental age of two to three with regard to most functions. Neill also suffers from seizures but they are not convulsive and he takes medication to control them. No evidence indicates that Neill is dangerous to others but he does require almost constant supervision because of his inability to recognize dangerous situations.

In 1976, Neill was evaluated and recommended for the Arlitt Child Development Center. It was believed that he would benefit from contact with non-handicapped children. In the spring of 1979, a conference was held to evaluate Neill's Individual Education Plan (IEP) as required by the Act.[3] Present at the conference were Neill's parents, school psychologists, and a member of the Hamilton County Board of Mental Retardation. After evaluating Neill, the school district decided to place him in a county school. Since these county schools were exclusively for mentally

---

3. 20 U.S.C. § 1401 (19) provides:

The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

retarded children, Neill would have received no contact with non-handicapped children.

The county schools receive part of their funding through tuition for individual students, which is paid by the school district. The county schools also receive partial funding through the state by virtue of a mental retardation tax levy. Funds from this levy are not available to public schools.

The Ronckers refused to accept the placement and sought a due process hearing before an impartial hearing officer pursuant to the Act. 20 U.S.C. § 1415(b)(2). The hearing officer found that the school district had not satisfied its burden of proving that its proposed placement afforded the maximum appropriate contact with non-handicapped children. He ordered that Neill "be placed within the appropriate special education class in the regular elementary school setting."

The school district appealed to the Ohio State Board of Education pursuant to 29 U.S.C. § 1415(c). The State Board found that Neill required the educational opportunities provided by the county school. It also found, however, that he needed interaction with non-handicapped children during lunch, recess and transportation to and from school. Accordingly, the State Board held that Neill should be placed in a county school so long as some provision was made for him to receive contact with non-handicapped children. The State Board did not indicate how this split program was to be administered.

While the dispute over placement continued, Neill began attending a class for the severely mentally retarded at Pleasant Ridge Elementary School in September 1979. Pleasant Ridge is a regular public school which serves both handicapped and non-handicapped children. Neill's contact with non-handicapped children at Pleasant Ridge is lim-

ited to lunch, gym and recess. Neill has remained at Pleasant Ridge during the pendency of this action.

In January 1980, Neill's mother filed this action against the state and the school district. The claims against the state were settled. Prior to trial, the district court denied class certification without a hearing.

At trial, both parties presented expert testimony. Both agreed that Neill required special instruction; he could not be placed in educational classes with non-handicapped children. The plaintiff, however, contended that Neill could be provided the special instruction he needed in a setting where he could have contact with non-handicapped children. The school district contended that Neill could not benefit significantly from mainstreaming and that any minimal benefits would be greatly outweighed by the educational benefits of the county school.

The district court found in favor of the school district. The court interpreted the Act's mainstreaming requirement as allowing school districts broad discretion in the placement of handicapped children. In this case, the district court found that the school district did not abuse its discretion in placing Neill Roncker in a school where he would receive no contact with non-handicapped children. This conclusion was supported by the district court's finding that Neill had made no significant progress after 18 months at Pleasant Ridge. Finally, the district court held that a class action was inappropriate because the educational placement of handicapped children requires individual determinations.

II

We find that the district court erred in reviewing the school district's placement decision under an "abuse of discretion" standard.

The Act provides that a district court "shall receive the records of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The school district contends that this provision only gives courts the limited authority to determine if the district has complied with the procedural requirements of the Act. The plaintiff, on the other hand, contends that the Act requires a *de novo* review not limited to the Act's procedural requirements.

This exact dispute over standard of review was presented and decided in *Rowley*, 102 S.Ct. 3034. The Supreme Court rejected the notion that courts were strictly limited to reviewing for procedural compliance with the Act. *Id.* at 3050-51. However, the Court also rejected the argument that the Act gave the courts broad power to review and upset placement decisions, stating that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 3051. The court concluded that the proper balance is to give greater deference to the state's placement decision if the procedural requirements of the Act are met. In this way, the court's encroachment on the basically legislative decisions involving the distribution of educational resources is kept to a minimum.[4]

The first inquiry in the two-step test mandated by *Rowley* is whether the state has complied with the Act's procedural requirements. These requirements clearly have

---

4. States which desired even less federal intrusion could simply decline to participate in the program. It should also be noted that challenges to administrative decisions may be filed in either state or federal court.

been satisfied in this case. The second inquiry is whether "the individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits?" *Id.* at 3051.

In *Rowley,* the Supreme Court found that the state had complied with the Act's procedural requirements and had developed an IEP reasonably calculated to lead to educational benefits. Accordingly, the Act was satisfied. The present case differs from *Rowley* in two significant ways.

First, this case involves the mainstreaming provision of the Act while *Rowley* involved a choice between two methods of educating a deaf student. In the latter case, the dispute is simply one of methodology and the Supreme Court has emphatically stated that such questions should be left to the states. *Id.* at 3051-52. In the present case, the question is not one of methodology but rather involves a determination of whether the school district has satisfied the Act's requirement that handicapped children be educated alongside non-handicapped children to the maximum extent appropriate. The states accept federal aid in return for compliance with the Act. Since Congress has decided that mainstreaming is appropriate, the states must accept that decision if they desire federal funds.

Second, in this case, the district court failed to give "due weight" to the state administrative proceedings. *Rowley,* 102 S.Ct. at 3051. Both the impartial hearing officer and the State Board of Education found that the school district's placement did not satisfy the Act's mainstreaming requirement. Under such circumstances, the district court erred in reviewing the school district's placement under the deferential abuse of discretion standard. Such a standard of review renders the administrative hearings provided for by the Act virtually meaningless. By way of

contrast, in *Rowley,* the administrative hearings unanimously concurred with the original placement but the district court found the placement to be inappropriate.

In sum, the abuse of discretion standard of review utilized by the district court was improper under the Act. We further find that the standard of review as set out in *Rowley* requires a *de novo* review but that the district court should give due weight to the state administrative proceedings in reaching its decision.

III

Since the district court employed an improper standard of review, we remand this case in order to allow the district court to re-examine the mainstreaming issue in light of the proper standard of review.[5]

The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference.[6] The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagree-

---

5. Unlike the dissent, we are unwilling to accept the district court's findings of fact as being totally independent from its conclusions of law. Having found that the District Court erred in its conclusions of law, we believe that remanding the case is preferable to attempting to apply the proper legal standard to factual findings which were made under an overly deferential standard of review.

6. The Act's mainstreaming requirement applies to nonacademic activities such as lunch, gym, recess and transportation to and from school. *See* 34 C.F.R. § 300.553.

ment is not, of course, any basis for not following the Act's mandate. *Campbell v. Talladega City Bd. of Education,* 518 F.Supp. 47, 55 (N.D. Ala. 1981). In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. *See Age v. Bullit County Schools,* 673 F.2d 141, 145 (6th Cir. 1982). Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such alternative placements benefits all handicapped children.

In the present case, the district court must determine whether Neill's educational, physical or emotional needs require some service which could not feasibly be provided in a class for handicapped children within a regular school or in the type of split program advocated by the State Board of Education. Although Neill's progress, or lack thereof, at Pleasant Ridge is a relevant factor in determining the maximum appropriate extent to which he can be mainstreamed, it is not dispositive since the district

court must determine whether Neill could have been provided with additional services, such as those provided at the county schools, which would have improved his performance at Pleasant Ridge.

We recognize that the mainstreaming issue imposes a difficult burden on the district court. Since Congress has chosen to impose that burden, however, the courts must do their best to fulfill their duty. The district courts are not without guidance inasmuch as they have the benefit of two state administrative proceedings and may justifiably give due weight to those administrative findings.

IV

The final issue before us is whether the district court erred in refusing to allow this case to proceed as a class action. Following oral arguments to the district court, a class was certified. That certification was conditional and, prior to trial, the district court denied the motion for class certification without a hearing. We believe that the district court erred and should, on remand, hold a hearing to determine if class relief is appropriate.

We find no bar to class actions in the Act. Several courts have certified class actions where the requirements of Rule 23 of the Federal Rules of Civil Procedure were met. *See, e.g., Battle v. Commonwealth of Pa.,* 629 F.2d 269 (3d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981); *Garrity v. Gallen,* 522 F.Supp. 965 (D.N.H. 1981); *Green v. Johnson,* 513 F.Supp. 965 (D.Mass. 1981). That the Act requires individual placement decisions does not of itself bar all class actions. *See Califano v. Yamasaki,* 442 U.S. 682, 698-701 (1979) (finding no bar to class actions under the Social Security Act despite that Act's provision that actions may be brought by "any individual." 42 U.S.C. § 405(g)).

Although we agree with the district court's statement that the Act requires individual determinations as to placement, one of the plaintiff's claims is that the school district automatically sends students classified as Trainable Mentally Retarded to the county schools. Such an allegation, if proven, would show a violation of the Act for the very reason that placements were not individually made. Furthermore, if children are labeled as TMR solely on the basis of IQ scores, the placements would violate § 1412(c)(5) which provides in part that "no single procedure shall be the sole criteria for determining an appropriate educational program for a child." The plaintiff should be given an opportunity to argue that there is sufficient evidence to justify class certification, at least as to certain issues.

The judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

KENNEDY, *Circuit Judge,* dissenting. The District Court has already done in part what the panel asks it to do on remand. As required by *Rowley,* it found that the educational program in which Neill Roncker was to be placed was reasonably calculated to enable him to receive educational benefits. The District Court also found that Neill could not be appropriately educated by continuing him in the self-contained class of handicapped children which he was attending in the regular elementary school.

In making these findings the District Court clearly recognized that placement with non-handicapped children should be a most important objective.

> The recipient of the federal funding, in this case the state and local Boards of Education, is required to provide an education for the handicapped individual and to "insure that handicapped persons participate with non-handicapped persons in such activities and services

> to the maximum extent appropriate to the needs of the handicapped person in question."

District Court Op. at 7.

The whole record of the District Court is devoted to the question of whether Neill Roncker's needs can be met in the self-contained handicapped classroom in the elementary school he has been attending or whether he needs to be taught with other children closer to his chronological age and learning level with the support services that can presently only be provided in the 169 program at a separate school. Appellant argues that the finding that Neill could not benefit from continued placement in his present classroom is clearly erroneous. The panel's opinion does not so find and I would not so find. These findings of fact are independent of the District Court's legal conclusions. Neill Roncker was not progressing in his present placement but was regressing. His ability to interact with the non-handicapped children was at best minimal. His opportunity to interact with non-handicapped children there was also very minimal. Yet, despite these findings, the panel's decision requires the District Court to determine on remand whether it would be "feasible" to provide an equivalent of what is now provided in the 169 schools in classrooms located in regular elementary schools. The District Court has admittedly not made such a finding. I do not believe, however, that such an inquiry is authorized by section 1412(5) or the "mainstreaming" concept it embodies.

Section 1412(5) requires that participating states establish,

> (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped,

> and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

In this language Congress has expressed a clear preference for educating handicapped children in the regular classrooms of the public schools. Handicapped children should be removed from regular classes only when their education cannot be achieved satisfactorily with the use of supplementary aids and services. Despite this preference for "mainstreaming," however, the statute clearly contemplates that there will be some separate schools and schooling. *Rowley,* ..... U.S. ....., 102 S.Ct. 3034, 3038, n.4 (1982). Section 1412(5) does not require that classrooms for the severely mentally retarded, such as Neill Roncker, whose only interaction with non-handicapped children is to observe them, be located in the regular elementary school. Rather, this section is directed to the handicapped child who can spend some time in the regular classroom if given special aids or assistance.[1]

Other than cost, the District Court in the present case has fully considered whether Neill Roncker could be educated in a self-contained handicapped classroom in a regular school. The severity of Neill's handicap is such that even with supplementary aids and services, the District Court found that Neill cannot achieve a satisfactory education or indeed any education in a regular class.

The appellants have nevertheless argued that if Neill must be educated in a 169 program, that program must be provided within the "regular school environment" even if

---

1. It is not necessary to decide whether the child who can attend a regular gym, or music class, falls within the statute's mainstreaming requirement.

the only benefit from such placement is to avoid the stigma of attending a special school. Because the 169 program requires children of chronological age with roughly the same developmental ability to be placed together, a classroom for each age could not be located at each regular school. However, the classrooms for one age could be at one school and those for another at a different school. The children could probably be bussed to assemblies. Special gym teachers, physical and occupational therapists and special remedial teachers could go from school to school. Appellant argues that this is required unless the children could learn "zero" in such environment.

The appellant's arguments essentially represent one of two competing educational theories presented by this case. The first is that a program with all of the components of the 169 program can only be fully implemented in a separate school. This program alone, it is argued, is appropriate for severely handicapped children such as Neill Roncker who cannot benefit from *any* regular classroom experience. The second theory is that all handicapped children (except those who can be in the regular classroom) must be placed in special classrooms located in regular elementary schools, unless a child would get zero benefit from a classroom so situated.

Rowley held that Congress did not intend the courts to overturn a state's educational policy once the statutory requirements have been met.

> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio School District v. Rodriguez,* 411 U.S. 1, 42 (1973). We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the

> Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

Rowley, ... U.S. at ....., 102 S.Ct. at 3052. When Congress imposes a requirement in legislation enacted pursuant to the spending power, it must do so unambiguously. *Rowley* ..... U.S. ....., 102 S.Ct. at 3049-3050 n. 26; *Pennhurst State School v. Halderman,* 451 U.S. 1, 17 (1981). Section 1412(5), far from unambiguously requiring that school districts place severely handicapped children in the regular school environment even if they cannot be satisfactorily educated in that environment, requires only that handicapped children be "mainstreamed" to the maximum extent *appropriate.* For those more severely retarded children, such as Neill Roncker, who are unable to be satisfactorily educated in any respect in a regular classroom, the statute does not prohibit the school district from making the judgment as to where their classroom should be located.[2]

I do not read the panel's decision as adopting the appellant's zero benefit position. For example, to the extent that the panel directs the District Court to consider costs it reserves some discretion to that court. Presumably, the District Court is permitted to decide whether one program is excessively expensive in comparison to another. Further, depending upon which definition of the word "feasible" the panel intends, *i.e.,* (1) capable of being done; (2) capable of being dealt with successfully, suitable; or,

---

2. This does not mean that the District Court does not review a placement to determine whether a child is receiving an appropriate education as defined in 20 U.S.C. § 1401(18).

(3) reasonable,[3] the District Court may have yet more discretion. If the District Court may make these discretionary decisions in determining whether a placement is appropriate, I see no grounds on which the school district should be denied such discretion insofar as placement of handicapped children who cannot benefit from any regular classes are concerned.

Finally, I am unable to agree that the District Court failed to give "due weight" to the state administrative proceedings. The disposition by the District Court was based upon Neill Roncker's progress and lack of progress in a special classroom. The administrative hearing officers did not have this actual information concerning Neill's progress but could only anticipate what his progress might be.[4]

Further, the two administrative decisions cannot themselves be fully reconciled. The impartial hearing officer, in making the initial decision of August 1979, appears to have been uncertain whether Neill would be able to handle assignment to a regular first grade class, something it is now clear he could not do.

---

3. *Webster's New International Dictionary* (2d Ed. 1961): 1. Capable of being done, executed, or effected; possible of realization. 2. Capable of being managed, utilized or dealt with successfully; suitable. 3. Likely; probable; reasonable.

Random House College Dictionary (1st Ed. 1975): 1. capable of being done or accomplished. 2. suitable. 3. probable; likely.

It is difficult in the context of this case to determine exactly which definition of "feasible" the panel intends. Since other school districts locate all handicapped classrooms in regular schools and Cincinnati previously did so, the record would require a finding that it is capable of being done. Therefore, I do not believe the panel intends this definition of feasible. In addition, the record discloses that these classes for the severely mentally retarded which had previously been dispersed among regular schools were not effective. Thus, the second definition of feasible seems equally inappropriate to remand in this case.

4. Since this case is to be remanded, it will be important that the District Court have current information with respect to Neill's present development and abilities before making a final disposition.

> There is doubt in the mind of the impartial hearing officer as to Neill's ability to attend the regular first grade setting, however, I don't believe that the complete answer is available to this question until he is assigned to the first grade and the attempt is made.

Hearing Officer's Op., App. at 195.

The hearing officer nonetheless directed that Neill be placed in the special education class in the regular school setting.

On appeal by the school district, the state board of education referee found that Cincinnati did not have to duplicate the 169 program in a regular elementary school as the hearing officer had mandated. She found, "Cincinnati has shown that the nature and severity of Neill's handicap warrants his removal from the regular educational environment . . . ." App. 210. She also found that placement in the 169 program at Dyer School was appropriate as long as Neill was provided an opportunity to interact with non-handicapped peers in a regular school setting in appropriate activities such as lunch, gym and transportation. How this was to be accomplished was not described, but it is suggested that an aide would transport him to the regular school for lunch and recess and perhaps some time in the future, art and music.

Neither appellant nor appellees are satisfied with this split attendance solution. "[C]ounsel for both the Ronckers and the school district expressed their opposition to the referee's proposed split attendance scheme as being inappropriate for Neil [sic] . . . ." App. 15. More importantly, although a number of experts testified, no witness endorsed split placement. Under these circumstances, where no expert witness approved or endorsed split placement, I do not believe we should suggest it as an appropriate placement.

I would affirm the judgment of the District Court that Neill Roncker's placement satisfies the requirements of section 1412(5).

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed July 20, 1981)

No. C-1-80-29

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER, *et al.*,
Plaintiffs,

v.

FRANKLIN WALTERS, *et al.*,
Defendants.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court following trial and presentation of evidence. Plaintiffs seek declaratory and injunctive relief barring defendants, The Cincinnati City School District Board of Education, from placing plaintiff Neill Roncker, a mentally retarded child, in classes operated by the Hamilton County Board of Mental Retardation, which are limited to handicapped children. The plaintiffs also seek an order requiring the formation of a class for "trainable mentally retarded" children in the Cincinnati Public Schools as an alternative to placement in the Hamilton County program. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith, its Findings of Fact, Opinion and Conclusions of Law.

I.

FINDINGS OF FACT

1. Neill Roncker was born on April 13, 1973. At the time of trial in March of 1981, he was a month short of his eighth birthday. Neill Roncker has an intelligent quotient (I.Q.) between 30 and 50. "Normal" I.Q. is considered to be approximately 100. An I.Q. of 50 is used to separate two categories of handicapped children. Those above are generally termed "educable mentally retarded" (EMR), those below are termed "trainable mentally retarded" (TMR).

In the field of education, there appear to be terms that are further descriptive of degree of mental retardation. Children are classified as "mild", "moderate", "severe" or "profoundly" retarded. While different descriptive terms have been used, it is agreed by all parties that Neill Roncker is a trainable mentally retarded child with a condition of either "moderate" or "severe" mental retardation. His mental age is in the two- to three-year range.

2. Neill Roncker was enrolled at the Arlitt Child Development Center, operated by the University of Cincinnati, in Sept. 1976. He received training there until June, 1979. In September of 1979, he was enrolled in the severe/multi-handicapped class at the Pleasant Ridge Elementary School operated by the Board of Education and has remained there ever since.

The class at the Pleasant Ridge School is composed of seven children, all of whom are handicapped, and supervised by a specially trained teacher with two assistants. Pleasant Ridge Elementary School is within the Cincinnati school district. It is primarily a school for non-handicapped children. The children in the handicapped class

as well as all others use the same lunchroom, although they sit at separate tables; the same gymnasium, although in separate groups, and the same playground. Other than peripheral contacts in these three areas, there is neither connection with nor interaction between the non-handicapped children and those in the handicapped class.

3. The Hamilton County Board of Mental Retardation is an entity that exists separate and apart from the Board of Education of the Cincinnati School District. It was created by Ohio Rev. Code 3323.09. Its schools and its classes are limited to mentally retarded children and, other than some contact with older, non-handicapped children who volunteer to participate in an instruction program for handicapped children, there is no contact with non-handicapped children. It maintains three separate schools within Hamilton County to serve the several boards of education therein.

4. In July of 1979, a hearing was held to determine the appropriate educational placement for Neill Roncker. This hearing was held in accordance with 20 U.S.C. §1415 (b)(2). The Impartial Hearing Officer issued his decision in August of 1979 and directed that the plaintiff be placed "within the appropriate special class in the regular elementary school setting." This decision was appealed to the Ohio State Board of Education. That body appointed a referee to review the proceedings and decisions and to make a recommendation.

In October of 1979, an additional hearing was held by such referee. On October 23, 1979, she issued her report and recommended that the Ohio State Board of Education reverse the determination of the Impartial Hearing Officer. On November 12, 1979, the referee's recommendation was adopted by the State Board of Education. Appeal to the

United States District Court from such determination was filed January 18, 1980.[1]

5. Neill Roncker has been examined and evaluated with the following conclusions:

(A.) On March 19, 1979, he was given an educational reevaluation by the Cincinnati Center for Developmental Disorders (Def. Ex. L). At that time, the evaluator determined that his gross motor functioning was at the three-year level, his fine motor functioning at the 24- to 29-month range and his language and cognition at the two-year level. The evaluator also noted that his progress since June of 1976 was minimal.

(B.) The Psychological Services of the Cincinnati Public Schools on January 13, 1981 (Def. Ex. H) determined that his mental age was two years, one month and his I.Q. below 30.

(C.) On February 12, 1981, an educational evaluation was made at the Children's Diagnostic Center. The evaluator determined that his performance in the area of gross motor functioning was at the three-year level, his fine motor and cognitive functioning were in the two- to two and one half-year range and the receptive language and expressive language were like that of a two year old. The evaluator specifically noted "of specific concern is the apparent drop in functioning". (Def. Ex. I).

(D.) A psychological evaluation was made on February 19, 1981 at the Children's Diagnostic Center (Def.

---

1. The original cause of action was filed against the members of the Ohio State Board of Education and the superintendant of public instruction of the State of Ohio. Prior to trial, a settlement was reached with such defendants and they were dismissed from this action. By agreement of the parties, Neill Roncker was enrolled in the special class at Pleasant Ridge Elementary School during the pendancy of this action.

Ex. J). The psychological evaluation determined that his mental age was two years, five months and indicated that, in relation to his chronological age of seven years, 10 months, his I.Q. was approximately 30.

A comparison of the evaluations of January 19, 1979 and those of February, 1981, indicate little, if any, progress in the plaintiff's development, although he had, in the two intervening years, spent 18 months as a member of a class of handicapped children in a public school composed primarily of non-handicapped children.

II.

OPINION

There are few questions more troubling in its human implication than the plight of a retarded child. Society has progressed from the days in the not so distant past when it was an accepted practice to place such children in institutions for the balance of their lives and pretend that they no longer existed. Recent developments in the law have resulted in recognition of legal rights of the handicapped. They have at least been removed from the category of "non-persons".

The issue presented here, however, appears to be less in the discipline of law and more in the fields of neurology, child psychology and education. The Court had the benefit of expert opinions. They were in all instances detailed and comprehensive. They were also essentially contradictory. There are, it appears, differing schools of thought sincerely subscribed to by outstanding individuals regarding the treatment of a retarded child. Indeed, one expert, Dr. William Bricker, who testified before the Court, sought primarily to reconcile the differing viewpoints, but apparently, to this point, without great success.

A court of law is equipped only to determine legal rights established by statutes, precedents and rules of evidence. Within these limitations, a fair and just society may be fashioned. A perfect society, however, will not.

The duty enjoined upon this Court is set forth in 20 U.S.C. §1415(e)(2). The Court "shall [1] receive the records of the administrative proceedings . . . [2] hear additional evidence at the request of a party and [3] bas[e] its decision on the preponderance of the evidence.

Implicit in the foregoing are the following: Public officials are deemed to act in good faith and within the limits of their appropriate authority. Absent a showing to the contrary, no presumption of either an abuse of discretion or bad faith may attend any decisions of such public officials. No evidence of bad faith or abuse of discretion was present in this case.

Although the plaintiffs have made claims pursuant to 29 U.S.C. §794, 42 U.S.C. §1983, and the 14th Amendment, the provisions of The Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (The Act), are controlling.

A brief review of the federal statutory scheme in this area will aid in an understanding of the posture of this case. The Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), represents an attempt by Congress to assist the states in meeting the burdens imposed upon them by the widespread judicial recognition of "the right of handicapped children to a free public education appropriate to their needs." (Footnote omitted). *Battle v. Commonwealth of Pennsylvania,* 629 F.2d 269, 272 (3rd Cir. 1980). The Act is based upon the principle that all handicapped children are entitled to a free public education that is appropriate to their needs and that meets the same standards as the education offered to non-handicapped chil-

dren. Each state seeking to participate and to receive federal funding must develop guidelines and follow the procedures set forth in 20 U.S.C. §1401, *et seq.*

One of the statutory mandates requires the formation of an individualized educational program (I.E.P.) for each handicapped child. 20 U.S.C. §1412(4). The I.E.P. must set forth the child's present level of education, both the long-term and short-term educational goals developed for that child, the educational services to be provided for that child, and a structure for evaluating the child's progress towards those goals, 20 U.S.C. §1401(19). The local educational agency must review the I.E.P. "periodically but not less than annually." 20 U.S.C. §1414(a)(5). The child's parents must be given the opportunity to review the I.E.P., provide input into the placement process, and to obtain an independent educational evaluation of their child if they do not agree with the placement suggested by the local agency. 20 U.S.C. §1415(b)(1)(A).

The Ronckers disputed the suggested placement of their son with the Hamilton County Board of Mental Retardation. Prior to the filing of this case, they exhausted all of the administrative remedies provided by the statute. Consequently, the jurisdictional prerequisite to the filing of an action in this Court, exhaustion of the administrative remedies, has been met. *Scruggs v. Campbell,* 630 F.2d 237 (4th Cir. 1980), *Doe v. Anrig,* 500 F.Supp. 802 (D. Mass. 1980).

The question before the Court is an extremely narrow one. As stipulated, the plaintiffs raise no claims with respect to procedural violations at any of the prior administrative proceedings. (Doc. No. 21). The thrust of the plaintiffs' claims focuses upon the requirement that the State establish "procedures to assure that, *to the maximum*

extent appropriate, handicapped children, . . . are educated with children who are not handicapped, . . .". 20 U.S.C. §1412(5)(B) (emphasis added). Apparently, the Court must define "to the maximum extent appropriate" as applied to the case of Neill Roncker.

The recipient of the federal funding, in this case the state and local Boards of Educations, is required to provide an education for the handicapped individual and to "insure that handicapped persons participate with non-handicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question." 34 C.F.R. §104.34(b). Appendix A to that section of the Code of Federal Regulations offers some guidance to determining the proper definition of "appropriateness" in the context of the education for the handicapped statutes. Educational services for the handicapped must be designed to meet the handicapped child's individual educational needs to the same extent that those of non-handicapped children are met. The comments suggest a preference for integrating handicapped students with non-handicapped students wherever possible. However, those comments also recognize that there may be instances in which separate facilities are necessary and, by example, point to facilities for severely retarded persons.

It is clear that the phrase "to the maximum extent appropriate" does not impose an absolute obligation. The statute does not impose a mandatory duty to educate handicapped children in an integrated environment with non-handicapped children. A statute imposing such a duty could easily have been fashioned by Congress.

The options before this Court for Neill Roncker's placement are three-fold. (1) The child's continuation in his

present class at Pleasant Ridge Elementary;[2] (2) the child's placement in the 169 program operated by the Hamilton County Board of Mental Retardation; or (3) the child's placement in a class for trainable mentally retarded children in the public school system.

Whatever else may be in dispute in this case, it appears that Neill Roncker made little, if any, identifiable progress from March of 1979 to February of 1981 although enrolled in a class of handicapped children in a public school composed primarily of non-handicapped children. (Finding of Fact No. 5).

The preponderance of evidence presented to the Court both in oral testimony and in the records of the administrative proceedings establishes that this child cannot be appropriately educated in a regular educational environment, with the use of supplementary aids and services.

The preponderance of evidence does not establish that the child may be appropriately educated by continuing him in a class of handicapped children placed in a school of non-handicapped children.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction in accordance with 20 U.S.C. §1415(e)(2).

B. The use of the phrase "maximum extent appropriate" does not impose an absolute duty but rather grants discretion to determine the placement of handicapped children.

---

2. Neither this option nor the child's placement in a regular public school class with non-handicapped children has been urged by either side.

C. Where a Board of Education has made a full assessment of appropriate placement of a handicapped child, that determination, in the absence of an abuse of discretion, will not be set aside.

D. It is not an abuse of discretion to discontinue the placement of a child in a class of handicapped children in a regular public school where such placement after 18 months has resulted in no significant progress.

E. The appropriate educational placement of handicapped children is an individual determination and is not a matter to be determined in a class action.

F. In view of the foregoing conclusions of law, the complaint of plaintiff should be and it is hereby DENIED. Each party to pay its own costs.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed July 20, 1981)

Civil Action File No. C-1-80-29

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MARY ANN RONCKER, *et al.*,
Plaintiffs,

vs.

FRANKLIN WALTER, *et al.*,
Defendants.

JUDGMENT

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action herein is hereby DISMISSED; Each party to pay its own costs.

JOHN D. LYTER
Clerk of Court
/s/ By: REBECCA E. ANDERSON
Deputy

DISMISSAL ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed May 6, 1981)

Case No. C-1-80-029

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER
On behalf of Neill Roncker,
Plaintiff,

vs.

FRANKLIN B. WALTER, *et al.*,
Defendants.

DISMISSAL ENTRY

This cause of action, under the terms of the Settlement Agreement attached hereto and incorporated herein is hereby settled and dismissed with prejudice as to the State Defendants, parties to share costs.

/s/ CARL B. RUBIN
United States District Court
Judge

SETTLEMENT AGREEMENT

This Agreement is made and entered into this 23rd day of April, 1981, by and between MARY ANN RONCKER on behalf of NEILL RONCKER, Plaintiff in the case of

Roncker v. Walter et al., United States District Court, Southern District of Ohio, Eastern Division, Case No. C-1-80-029, and the following State Defendants in said litigation, MARTHA B. AGLER, WALLACE E. BLAKE, GRACE T. CHRISTY, TIMOTHY M. FLANAGAN, RICHARD C. GLOWACKI, JOHN E. HOLCOMB, VIRGINIA E. JACOBS, EVERETT L. JUNG, M.D., THOMAS A. KELTY, GERALD D. KISNER, MARY R. LINDNER, ROY MCKINLEY, JOHN R. MECKSTROTH, NANCY L. OLIVER, PAUL F. PFEIFFER, DONALD S. RITTER, CHESTER A. ROUSH, ANTHONY J. RUSSO, RUTH S. SCHILDHOUSE, WAYNE E. SHAFFER, ROBERT W. WALKER, ROBERT E. WILLIAMS, MARTHA WISE, In their capacities as members of the State Board of Education for the State of Ohio and FRANKLIN B. WALTER, as Superintendent of Public Instruction for the State of Ohio.

Recitals

WHEREAS, Plaintiff initiated a certain civil action against State Defendants and other local Defendants on January 18, 1980 as styled above, and

WHEREAS, The parties to this agreement desire to settle the complaint herein by execution of this Settlement Agreement, State Defendants neither affirming nor denying the factual or legal allegations made by Plaintiff in these pleadings,

NOW THEREFORE, In consideration of the mutual promises set forth below, the parties agree as follows:

§1

State Defendants shall issue a Memorandum regarding the placement of handicapped children in the least restrictive environment. Said Memorandum is attached here-

to as Exhibit A. This Memorandum will be distributed to superintendents of all local, city, exempted village, joint vocational and nonpublic schools, state institutions and county boards of mental retardation.

§2

State Defendants will add to their Program Review and Evaluation Procedures for Special Education (PREP), a section entitled "Review Guide For Least Restrictive Environment." Said section is attached hereto as Exhibit B.

§3

State Defendants will add two items to the assurances required of school districts applying for federal funds under Part B of the Education of the Handicapped Act. Said assurances are attached hereto as Exhibit C.

§4

State Defendants will make available to counsel for Plaintiff the tabulated data collected in the Annual Report to Legislature required by Section 3323.02 Revised Code.

§5

Within twelve months from the date of this agreement, State Defendants will sponsor a statewide practitioners' conference on the least restrictive environment requirement. Educators from school districts throughout the state will be invited. Planning for the conference will involve representatives from such groups as the Ohio State University Multi-factored Evaluation Project, the Regional Resource Center Project, and the Dean's Task Force. Counsel for Plaintiff may attend planning meetings for the conference and the conference itself.

§6

State Defendants will give priority to funding of additional units for educational programs serving developmentally handicapped and multihandicapped children in the public schools. (Said programs refer to those defined in Proposed Rules For The Education of Handicapped Children. In the present Standards for Special Education corresponding reference is to the programs for educable mentally retarded children and children with severe and/or multiple impairments.)

§7

Nothing in this agreement shall preclude State Defendants from modifying their policies and procedures regarding least restrictive environment to reflect changing state or federal law or regulation, controlling judicial decisions, or interpretations by the Office of Special Education, United States Department of Education. Furthermore, actions to improve the efficiency and utility of PREP or data collection by State Defendants are not prohibited by this agreement. Notification of any such modification will be conveyed in writing to counsel for Plaintiff herein.

§8

Plaintiff shall dismiss with prejudice all claims of any kind or nature which Plaintiff has or may have claimed in this case against State Defendants based upon any and all matters up to and including the execution date of this agreement. This agreement shall not take effect until Plaintiff has filed said dismissal with the court.

§9

Plaintiff and her attorneys hereby agree to waive any claim or right to attorney fees pursuant to 42 U.S.C. §1988 or any other method of recovery of such fees.

§10

State Defendants hereby agree to pay to counsel for Plaintiff, nine hundred dollars ($900.00) as partial compensation for the costs of this action.

The parties, through respective counsel, hereby execute this Settlement Agreement on the day, month and year first set forth above.

/s/ BARRY COHEN
Barry Cohen, Esq.

and

/s/ CLEMENT PYLES
Clement Pyles, Esq.
Counsel for Mary Ann Roncker on behalf of Neill Roncker

/s/ RICHARD W. ROSS
Richard W. Ross
Assistant Attorney General
Counsel for State Departments

EXHIBIT A

STATE OF OHIO
DEPARTMENT OF EDUCATION
Columbus
43215

FRANKLIN B. WALTER
Superintendent of
Public Instruction

TO: City, County, Exempted Village, Local, JVS, Nonpublic, State Institutions and County Boards of Mental Retardation Superintendents

FROM: Franklin B. Walter, Superintendent of Public Instruction

SUBJECT: Placement of Handicapped Children in the Least Restrictive Environment

---

Numerous questions regarding the placement of handicapped children in the least restrictive environment have been raised by school district personnel and by individuals involved in litigation. This memorandum is being issued to assist school districts in identifying the specific federal regulations that govern the placement of handicapped children in the least restrictive environment. Also enclosed is a copy of the Least Restrictive Environment Placement Review Guide that will be used by the Division of Special Education in its onsite review of special education programs as required by federal regulations promulgated for Public Law 94-142.

The following federal regulations must be considered in determining the least restrictive environment of each handicapped child:

I. "(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." [34 Code of Federal Regulations (CFR) 300.550, formerly 45 CFR 121a.550]

II. "(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under 300.13 (formerly 121a.13) of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." (34 CFR 300.551, formerly 45 CFR 121a.551)

III. "Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually;

(2) Is based on his or her individualized education program; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included under 300.551 (formerly 121a.551) are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs." (34 CFR 300.552, formerly 45 CFR 121a.552)

IV. "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 300.306 (formerly 121a.306) of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child." (34 CFR 300.553, formerly 45 CFR 121a.553)

V. "Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education." (34 CFR 300.305, formerly 45 CFR 121a.305)

VI. "(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available." (34 CFR 300.306, formerly 45 CFR 121a.306)

VII. "(a) General. Physical education services, specially designed, if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) Regular physical education. Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility, or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) Special physical education. If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) Education in separate facilities. The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section." (34 CFR 300.307, formerly 45 CFR 121a.307)

VIII. "Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that 300.550 (formerly 121a.550) is effectively implemented." (34 CFR 300.554, formerly 45 CFR 121a.554)

While including some of the above requirements, 34 CFR §104.34, issued pursuant to §504 of the Rehabilitation Act of 1973, provides that:

> "(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternative setting to the person's home.
>
> (b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 104.37(a)(2), a recipient shall ensure that handicapped persons participate with non-handicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.
>
> (c) Comparable facilities. If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient."

The U. S. Department of Education, in explaining these regulations, has stated, "A separate facility violates §504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students." 45 Fed. Reg. 30952.

Accordingly, the following factors do not, by themselves, justify the placement of a handicapped child in a separate facility:

(1) The fact that a classroom unit for multihandicapped children may not be available; or

(2) The fact that needed related services may not be currently available through the school district; or

(3) The fact that the child meets the eligibility criteria for programs of the county boards of mental retardation.

In an I.E.P. conference with parents, school districts may propose placement of a handicapped child in a separate educational facility when the assessment team, upon review of the multifactored interdisciplinary evaluation and continuum of alternative placements, determines a separate educational facility to be necessary for the provision of an appropriate education. If such a determination is made, the child's I.E.P. must specify the need(s) which necessitate placement in a separate educational facility. Parents are to be informed of the availability and characteristics of all appropriate alternative placements in the continuum including special education programs for developmentally handicapped and multihandicapped children in the public schools.

When the above conditions have been followed, any placement mutually agreed to by the school district and the parents may be considered appropriate.

Future annual reviews of an I.E.P. and placement decision need to consider the federal regulations outlined above, especially those reviews for children placed in a program operated by a county board of mental retardation.

Provisions of these federal regulations have also been incorporated in the attached "Review Guide for Least Restrictive Environment", which will become a part of PREP.

FBW:js attachs.

EXHIBIT B

REVIEW GUIDE FOR LEAST RESTRICTIVE ENVIRONMENT 34 CFR 300.550 - 300.556 (Formerly 45 CFR 121a.550-121a.556)

COUNTY _____ DISTRICT _____

DATE COMPLETED _____

REVIEWER _____

NAME OF DISTRICT'S REPRESENTATIVE _____

POSITION _____

	Yes	No	Comments
I. Does your district insure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or in other care facilities, are educated with children who are not handicapped? 34 CFR 300.550(b)(1) [Formerly 45 CFR 121a.550(b)(1)]			
Does your district have arrangements or agreements with public and private institutions to assure that no child in an institution who is capable of education in a regular public school setting is denied access to an education in that setting? 34 CFR 300.554 [Formerly 45 CFR 121a.554]			
III. Does your district insure that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular class with the use of supplementary aids and services cannot be achieved satisfactorily? 34 CFR 300.550(b)(2) [Formerly 45 CFR 121a.550(b)(2)]			

	Yes	No	Comments
IV. Does your district insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services? 34 CFR 300.551(a) [Formerly 45 CFR 121a.551(a)]			
V. Are the following continuum of alternative placements available at or provided by your school district? a) Instruction in regular classes; b) Instruction in special classes; c) Instruction in special schools; d) Home instruction; e) Instruction in hospitals and institutions. . . . . . 34 CFR 300.551(b)(1) [Formerly 45 CFR 121a.551(b)(1)]			
I.. Does your district insure that the continuum of alternative placements make provision for supplementary services to be provided in conjunction with regular class placement, including a) Provision of resource room? b) Provision of itinerant instruction? 34 CFR 300.551(b)(2) [Formerly 45 CFR 121a.551(b)(2)]			
I. Does your district insure that each handicapped child's educational placement a) Is determined at least annually? b) Is based on his/her individualized education program? c) Is as close as possible to the child's home? 34 CFR 300.552(a) [Formerly 45 CFR 121a.552(a)]			
I. Does your district insure that the alternative educational placement options are available to the extent necessary to implement the individualized education program for each handicapped child? 34 CFR 300.552(b) [Formerly 45 CFR 121a.552(b)]			

	Yes	No	Comments
IX. Does your district insure that each child is educated in the school which he or she would attend if not handicapped, unless the child's individualized education program requires some other arrangements? 34 CFR 300.552(c) [Formerly 45 CFR 121a.552(c)]			
X. Does your district insure that placement in the least restrictive environment takes into consideration any potential harmful effect on the child or on the quality of services which he or she needs? 34 CFR 300.552(d) [Formerly 45 CFR 121a.552(d)]			
XI. Does your district insure that each handicapped child participates with nonhandicapped children in the following services and activities to the maximum extent appropriate to the needs of that child?			
a) Meals			
b) Recess periods			
c) Art			
d) Music			
e) Industrial arts			
f) Consumer and homemaking education			
g) Vocational education			
h) Counseling services			
i) Athletics			
j) Transportation			
k) Health services			
l) Recreational activities			
m) Special interest groups or clubs			
n) Employment of students and assistance in making outside employment available			
34 CFR 300.553, and .305, .307 [Formerly 45 CFR 121a.553, and .305, .307]			

	Yes	No	Comments
Does your district insure that each parent or surrogate parent of a handicapped child, or each handicapped child if appropriate, is informed of all placement options for which the child is eligible according to state standards? 34 CFR 300.504 [Formerly 45 CFR 121a.504]			
Does your district insure that no handicapped child is assigned to a separate educational facility unless the child's I.E.P. documents that the child's needs are such that a separate educational facility is necessary to the provision of an appropriate education for the child? 34 CFR 104.34(c) [Formerly 45 CFR 84.34(c)]			

EXHIBIT C

ASSURANCE FOR FLOW-THRU APPLICATION ON LRE

The applicant school district assures:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

ORDER OF THE UNITED STATES DISTRICT COURT DETERMINING SCOPE OF JUDICIAL REVIEW AND DENYING CLASS CERTIFICATION

(Filed March 13, 1981)

Civil No. C-1-80-29

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER, *et al.*,
Plaintiffs,

v.

FRANKLIN B. WALTER, *et al.*,
Defendants.

ORDER DETERMINING SCOPE OF
JUDICIAL REVIEW
AND DENYING CLASS CERTIFICATION

This matter is before the Court pursuant to request that the parties file briefs as to the appropriate scope of judicial review by this Court. Upon consideration of such briefs, it is the Court's determination that in accordance with 20 U.S.C. §1415(e)(2) the plaintiff is entitled to present additional evidence to the Court as well as place into evidence the records of the administrative proceeding. Accordingly, the Court determines that this matter will be heard *de novo* commencing Tuesday, March 17, 1981.

On December 18, 1980 the Court did certify a class action in this matter. A class action and a trial *de novo* on the rights of this plaintiff appear at this time to be inconsistent. The presentation of evidence and the administrative record can only relate to the plaintiff in this action. The Court will be called upon to determine whether, by a preponderance of the evidence, plaintiff is entitled to the relief sought. A determination as to relief for this plaintiff does not bear upon the rights of any other person listed in the intended class.

Accordingly, the Order of this Court of December 18, 1980 is hereby set aside and the motion for class certification is hereby DENIED. This matter will proceed as an action between the individual plaintiff and the defendants herein.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

ORDER OF THE UNITED STATES DISTRICT COURT CONDITIONALLY CERTIFYING CLASS ACTION

(Filed December 19, 1980)

No. C-1-80-029

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARY ANN RONCKER, on behalf of NEILL RONCKER individually and on behalf of all others similarly situated,
Plaintiff,

v.

FRANKLIN B. WALTER, *et al.*,
Defendants.

ORDER

This matter is before the Court on plaintiff's motion for certification of a class action to be maintained under Rule 23(b)(2), Federal Rules of Civil Procedure. Plaintiff seeks to represent a class defined as "Every handicapped child between the ages of 5 and 21, inclusive, in Ohio, during the pendency of this suit whose most recent school placement decision by the School District Superintendent calls for placement in a program operated by a County Board of Mental Retardation . . ." For reasons stated hereafter, the Court declines to certify a class as broad as the foregoing. The Court will, however, certify a class as hereinafter described.

Neill Roncker is a handicapped child within the meaning of 20 U.S.C. §1401(1) which states in part as follows:

> "The term 'handicapped children' means mentally retarded . . . children or children with specific learning disabilities who by reason thereof require special education and related services . . . ."

During oral argument, counsel for plaintiff advised the Court that Neill Roncker has an I.Q. of under 50, which it is agreed is evidence of mental retardation.

It is not controverted that in accordance with the federal laws on education of the handicapped and Ohio Revised Code Chapter 3323, the plaintiff was examined by defendants or their agents and determined to be sufficiently mentally retarded that he should be placed in a special education program operated by the Hamilton County Board of Mental Retardation. Plaintiff's parents contested this finding and litigated this matter through the administrative procedures provided in Ohio Revised Code Chapter 3323. The matter was ultimately appealed to the State Board of Education and the decision that plaintiff be placed in a program operated by the Hamilton County Board of Mental Retardation was affirmed.

It is apparently the crux of plaintiff's argument that while there are options for the placement of the "educable mentally retarded," such as placement in regular classes with non-handicapped children, placement in classes of handicapped children in a school with non-handicapped

---

1. Counsel for both sides have used the terms "trainable mentally retarded" and "educable mentally retarded" and agree that a distinction between the two is an I.Q. of 50. These terms do not appear anywhere in 20 U.S.C. §1401 *et seq.* entitled "Education of Handicapped." They do appear in "Standards for Special Education" prepared by the Ohio State Board of Education.

children or placement in a school solely for handicapped children, such options do not exist for the "trainable mentally retarded" and this represents a violation of the federal Education of Handicapped statutes referred to above.

It is in the foregoing context that the Court must consider the question of whether or not this matter qualifies as a class action. Rule 23(a) of the Federal Rules of Civil Procedure establishes the following prerequisites:

1. Numerosity of class;
2. Commonality of questions of law or fact;
3. Typicality of the claims of the plaintiff; and
4. The fair and adequate representation of the class by plaintiff and plaintiff's counsel.

It is not possible at this point in the proceeding to determine the numerosity of the class. Plaintiff asserts that the class numbers more than 9,000 (Complaint p. 3). That number, however, refers to the class as proposed by plaintiff which this Court finds to be excessive. It is not correct, and even plaintiff does not so assert, that every handicapped child in Ohio has been dealt with in a fashion incompatible with the Education of the Handicapped Act. As pointed out above, it is apparently plaintiff's contention that the "trainable mentally retarded" alone have been denied the options granted to the "educable mentally retarded." The numerosity of class, therefore, must be limited to the "trainable mentally retarded" and that is a matter upon which counsel have not been able to assist the Court.

The questions of both "typicality" and "commonality" need be considered together, since they likewise bear upon the observations made above. Plaintiff's claim is typical

only of the "trainable mentally retarded" and it is only with such group that he possesses the requisite commonality.

It is clear to the Court that plaintiff's counsel are experienced and capable and will give fair and adequate representation to the class.

Satisfying the prerequisites of Rule 23(a) is not enough. In addition to the foregoing, Rule 23(b) requires a further determination. Plaintiff seeks to maintain a class action under Rule 23(b)(2) which provides:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Neither the pleadings nor the memoranda nor the oral argument of counsel indicates an action or refusal to act based upon plaintiff's proposed class. The requirements of Rule 23(b)(2) are satisfied if a more narrowly defined class is certified.

Based upon the proceedings in this matter to this date, it is apparent that only the action of defendants in limiting the placement options of the "trainable mentally retarded" is in issue and it is to such group that the defendants have acted or refused to act.

Accordingly, plaintiff's motion to certify a class as "every handicapped child between the ages of 5 and 21, inclusive, in Ohio during the pendency of this suit whose most recent school placement decision by the School District Superintendent calls for placement in a program operated by a County Board of Mental Retardation is hereby DENIED.

The Court does hereby CERTIFY a class that may be represented by plaintiff, defined as follows:

> Every trainable mentally retarded child between the ages of 5 and 21, inclusive, in Ohio during the pendency of this suit who has been denied placement in an educational program by a School District Superintendent other than one which is completely separated, both administratively and geographically, from public schools attended by children who are not handicapped.

Rule 23(c)(1) provides in part as follows:

> An order under this subdivision may be conditional and may be altered or amended before the decision on the merits.

Since the Court is unable to determine at this time either the merits of plaintiff's claim or the likelihood that defendants' decisions affect a sufficiently numerous class, the certification hereunder will be conditional only and such certification may be altered or amended before the decision on the merits.

It is so ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 23, 1983)

No. 81-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY ANN RONCKER on behalf of NEILL RONCKER, Individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

vs.

FRANKLIN B. WALTER, *et al.*,
Defendants-Appellees.

Before: KENNEDY and CONTIE, *Circuit Judges;* and GORDON, *Senior District Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as item-

ized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

STATUTES

20 U.S.C. § 1401

§ 1401. Definitions

As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) The term "Commissioner" means the Commissioner of Education.

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi-professional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution

offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A)

have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary

and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

Pub.L. 91-230, Title VI, § 602, Apr. 13, 1970, 84 Stat. 175; Pub.L. 94-142, § 4(a), Nov. 29, 1975, 89 Stat. 775.

20 U.S.C. § 1412

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available

to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected

and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub.L. 91-230, Title VI, § 612, Apr. 13, 1970, 84 Stat. 178; Pub.L. 92-318, Title IV, § 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub.L. 93-380, Title VI, §§ 614(b), (f)(1), 615(a), Title VIII, § 843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub.L. 94-142, §§ 2(a)(4) (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780.

20 U.S.C. § 1415

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the chlid;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any

party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413 (a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall

have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, § 615, as added Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.